

**SYED MAHADZIR BIN SYED ABDULLAH v.
KETUA POLIS NEGARA & ANOR.**

[O.C.J. (Mohamed Dzaiddin J.) September 9 & 10, 1985]

[Penang – Civil Suit No. 357 of 1982]

Practice and Procedure – Application for dismissal of suit for want of prosecution – Delay in filing statement of claim.

The defendants in this case sought for the dismissal of the suit for want of prosecution. The court found that there was merit in the plaintiff's case and held that the 43 days delay in filing the statement of claim could not amount to inordinate and inexcusable delay.

Cases referred to:

- (1) *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 M.L.J. 152 at p. 153.
- (2) *Vasudevan v. T. Damodaran & Anor.* [1981] 2 M.L.J. 150 F.C.

APPLICATION.*Karpal Singh* for the plaintiff.*Mary Lim (Miss)* for the defendants.*Cur. Adv. Vult.*

Mohamed Dzaiddin J. : This is an application by summons on the part of the defendants for this civil suit to be dismissed for want of prosecution.

On July 19, 1982 the plaintiff issued a writ against the 1st and 2nd defendants claiming a declaration that the termination and/or dismissal of his service as an Inspector of Police by the defendants was unlawful and null and void. The Writ of Summons was served on the 2nd defendant on August 10, 1982 and appearance was entered by the Attorney General's Chambers ("Chambers") on behalf of the 2nd defendant on August 18, 1982. Some three months later, on November 18, 1982 the Chambers wrote to the plaintiff's solicitors giving them 48 hours to file and serve the Statement of Claim. In response, the plaintiff's solicitors replied to the Chambers on November 22, 1982 requesting for 3 weeks to file the Statement of Claim. On December 4, 1982 the Chambers agreed to the request but made it a condition that the Statement of Claim must be filed on or before December 13, 1982. Nothing further was heard after that. So, on January 13, 1983 the Chambers

A filed this application to dismiss the suit for want of prosecution. The summons was served on the plaintiff's solicitors on January 24, 1983. I suppose the plaintiff, sensing danger and without further hesitation, filed his Statement of Claim on January 26, 1983.

B The law applicable to this particular issue is clear and is succinctly stated by Salleh Abas F.J. (as he then was) in *Toh Hock Thye & Ors. v. Toh Chwee Biow*⁽¹⁾ as follows:

C "... we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus – that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it."

D The panel of judges in *Toh Hock Thye's case*, in fact, accepted the statement of the law stated by Abdoolcader J. (as he then was) in *Vasudevan v. T. Damodaran & Anor.*⁽²⁾

E Applying the above principle to the present case, in my judgment there is merit in the plaintiff's case. Looking at the Statement of Claim, I think, in essence the complaint of the plaintiff is that he is dissatisfied with the defendants' decision to retire him compulsorily for health reasons and he wants a declaration that the said retirement is null and void and of no effect. The plaintiff affirmed an affidavit on December 26, 1983 to explain the delay stating that he required certain documents and letters to enable his solicitors to file the Statement of Claim, although this was disputed by the defendants. At any rate, the delay in filing the Statement of Claim was 43 days. I do not think, in the circumstances of this case the period of 43 days could amount to an inordinate and inexcusable delay. On the facts, the present case can be distinguished with *Toh Hock Thye* and *Vasudevan (supra)* where in the latter cases the delay was between 5 and 10 years. In addition, I do not consider plaintiff's default to have been intentional which could have prejudiced the defendants. In the premises, I dismiss the defendants' application. Costs shall be costs in the cause.

*Application dismissed.*Solicitors: *Karpal Singh & Co.*